No. 20158

In the

United States Court of Appeals

For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Respondent,
vs.
ESTELLE LATTA,
Defendant and Appellant.

Appellant's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.

PRELIMINARY STATEMENT

In seeking reversal of the summary judgment entered against her in this case, the defendant contends that the District Court erroneously sponsored two principles, one express and one implied, which violate accepted standards of procedural due process and thwart the orderly administration of civil justice.

1. The expressly stated principle is that on a motion for summary judgment, when the opposition relies on defects in the moving party's case rather than on counter-affidavits, the Court's only task is to see if the moving

party has established a prima facie case for the counts contained in the complaint. If so, the motion for summary judgment will be granted.

2. The impliedly stated principle is that the Securities and Exchange Commission has jurisdiction over the sharing of expenses, including legal expenses, in a family cooperative effort to preserve certain legal rights.

Neither of these principles, in the defendant's view, is justifiable.

II.

JURISDICTIONAL STATEMENT

A. On Appeal

The jurisdiction of this Court is invoked under 28 United States Code # 1291.

B. In the District Court

The jurisdiction of the District Court was invoked under 15 United States Code ## 77e(a), 77e(c), 77q(a)(2), 77q(a)(3) and 77v(a).

The action taken by the District Court (*i.e.*, the granting of a summary judgment for permanent injunction) was based on Rule 56 of the Federal Rules of Civil Procedure.

III.

STATEMENT OF THE CASE

The plaintiff filed a complaint for injunction on March 11, 1963, which was followed by a preliminary consent injunction on April 16, 1963 and by the defendant's answer on May 20, 1963.

On October 11, 1963, the plaintiff filed an amended complaint for injunction in three counts. (Clerk's Transcript, p. 7.)

The first count charged a violation of 15 United States Code ## 77e(a) and 77e(c), alleging that the defendant was using means of interstate commerce and the mails to sell and offer to sell securities, *i.e.,* investment contracts and certificates of interest and participation in profit-sharing agreements, by use of a prospectus and otherwise, for sale to members of the public on the representation that she would conduct litigation to recover the estate of Mark Hopkins and Moses Hopkins. The defendant was allegedly carrying those securities and causing them to go through interstate commerce for sale and delivery. No appropriate registration statement was on file with the Securities and Exchange Commission.

The second count charged a violation of 15 United States Code # 77q(a)(3), alleging that the defendant was carrying on the activities described in the first count by transactions, practices and a course of business which operated as a fraud and deceit on the purchasers of the securities because she was making untrue, misleading and deceptive statements of material fact representing and implying that judicial action which she was bringing may void a judicial decree of 1883, distributing the Mark Hopkins estate, and that the Mark Hopkins estate was subject to being judicially distributed to the so-called rightful heirs and the purchasers of securities. The defendant allegedly also made other untrue, misleading and deceptive statements of material fact with similar meaning and import.

In so doing, the second count further alleged, the defendant was omitting to state material facts that would make the statements not misleading, namely that her earlier complaint in the United States District Court was dismissed after she tried to have the Hopkins estate distribution declared void, and that the Ninth Circuit Court of Appeals

upheld the dismissal, ruling that the distribution was valid and had distributed the entire estate and that the defendant's claims were barred by the California statute of limitations and by laches.

The third count charged a violation of 15 United States Code # 77q(a)(2), alleging that the defendant was carrying on the activities described in the first and second counts to directly and indirectly obtain money and property.

By an answer filed November 20, 1963 the defendant denied these allegations. (C.T. 14.)

In a series of motions and memoranda, beginning July 6, 1964, both the plaintiff and the defendant requested summary judgment in his own favor and opposed the other's requests for such relief. The plaintiff's motions were based on the pleadings, the deposition of the defendant, the sworn testimony of L. C. Moore, the affidavits of Cornelia Hopkins, H. T. Nichols, Albert Sheppard and Jack Redden, and a certificate of the Records Officer of the Securities and Exchange Commission. The defendant's motions were based on the incompetency of the plaintiff's purported evidence, on the conflicts in the plaintiff's own evidence, on the innocent inferences which should have been drawn from the plaintiff's evidence, and on the defendant's ability, at trial, to establish a valid defense on the merits. (C.T. 1, 4, 15, 18, 21, 23, 25.)

The District Court heard this matter on October 26, 1964 and took it under submission. On March 25, 1965, the District Court issued a memorandum and order granting the plaintiff's motion for summary judgment, and ordering the plaintiff to prepare a formal injunction against the defendant. (C.T. 28.)

On April 15, 1965 the defendant filed a notice of appeal from the order granting the plaintiff's motion for summary judgment. (C.T. 31.)

The District Court, as of April 26, 1965, formally approved the findings of fact and conclusions of law submitted by the plaintiff, and formally executed a summary judgment of permanent injunction. (C.T. 34, 44.)

This appeal followed.

IV.

STATEMENT OF PURPORTED FACTS

The plaintiff has taken the position (which the District Court has adopted) that there are no genuine issues of material fact in this case. (C.T. 16, 30.) If that position were valid (which the defendant denies), the following facts would have been established to support the summary judgment here:

A. Mark Hopkins Estate and Contract Claimants

1. The fortune left by Mark Hopkins was distributed after his death by a decree entered in 1883 (C.T. 37.)

2. The defendant claims to be a "double blood heir" of Mark Hopkins, and is an author who has frequently written about her efforts to recover the Hopkins estate for the "rightful heirs." (C.T. 37.)

3. For many years the defendant has secured powers of attorney from purported Hopkins heirs authorizing her to act in their behalf in trying to recover and redistribute the Hopkins estate. (C.T. 38.)

4. During this period, the defendant has been offering and selling to purported Hopkins heirs and to other individuals instruments entitled, "Contract in Event of Recovery," which provide for fractional distribution of the Hopkins estate, if it is recovered by the administrator of the estate. (C.T. 39.)

5. Many of these contracts have been offered and sold to members of the public. (C.T. 39.)

6. If enough contracts were sold at $100.00 each to dispose of shares in 100% of the estate, the defendant would realize a total of $2,100,000.00 (The defendant, however, did explain that some contracts have been given to "deserving persons" or issued for services.) (C.T. 40.)

7. The defendant has not disclosed to contributors the manner in which the money raised through sale of contracts will be spent because that is "none of their business." (C.T. 40.)

B. Instruments as Securities

1. The contracts "in event of recovery" are "investment contracts" and "certificates of interest and participation" and therefore "securities" under 15 United States Code #77b(11). (C.T. 40.)

2. No appropriate registration certificate has been filed with the Securities and Exchange Commission. (C.T. 41.)

C. Litigation to Establish Claims to Mark Hopkins Estate

1. The Ninth Circuit Court of Appeals definitively disposed of the claims of contract holders, as well as other alleged heirs of Mark Hopkins, in *Latta v. Western Investment Co.* (1949) 173 F.2d 99. (C.T. 41.)

2. Alleged heirs of the Hopkins estate had brought suit in 1927 to establish a trust in their favor of property allegedly belonging to the Hopkins estate. (C.T. 41-42.)

3. The 1927 litigation alleged concealment of assets by the widow and brother of Mark Hopkins, but the suit was dismissed by the District Court "because of laches" and for "want of equity." The Ninth Circuit Court of Appeals affirmed the decree of dismissal in *Freeman v. Hopkins* (1929) 32 F.2d 756. (C.T. 42.)

4. The defendant has continued soliciting investments in the Hopkins estate after the Court of Appeals barred

any reasonable expectation of recovery from that source. (C.T. 42.)

D. Use of Mails and Facilities of Interstate Commerce

The defendant has used the mails and facilities of interstate commerce to offer, sell and deliver the securities to investors, and to carry out her deceitful and untruthful course of business in connection with the sale of the securities. (C.T. 42.)

V.

OPPOSITION TO PURPORTED FACTS

The defendant contends, and has consistently contended, that there are genuine issues of material fact to be determined in this case and that the summary judgment was improperly granted. (C.T. 24.)

VI.

QUESTIONS PRESENTED

1. On motion for summary judgment, when the opposition relies on defects in the moving party's case rather than on counter-affidavits, should the motion be granted if the moving party has done no more than establish a prima facie case for the counts contained in the complaint?

2. On a motion for summary judgment, when the opposition objects to material testimony in the moving party's affidavits, is it proper for the Court to state that it will disregard the incompetent parts of the affidavits while giving full effect to the competent parts, without specifying which parts it considers incompetent and which competent?

3. On a motion for summary judgment, is it proper for the Court to find that no genuine issue of material fact exists when the moving party's own purported evidence shows that genuine issues of material fact do exist?

4. Is the action taken by a federal court on what is essentially a California probate and estate matter a definitive disposition of that matter, so that failure to refer to the federal court action becomes a material concealment of fact in transactions affecting the estate?

5. Is the sharing of expenses, including legal expenses, in a family cooperative effort to preserve certain legal rights, an activity that falls within the jurisdiction of the Securities and Exchange Commission?

VII.

ARGUMENT

A. To Justify a Summary Judgment, the Moving Party Must Do More Than Establish a Prima Facie Case Since the Burden of Proof on Such a Motion Is Much More Strict Than at a Trial on the Merits

The District Court's basis for awarding the plaintiff a summary judgment was clearly—and erroneously—expressed in the Memorandum and Order of March 25, 1965:

> Due to the fact that the defendant has filed no affidavits in contradiction to those filed by the Securities and Exchange Commission, the only task left for the Court is to examine plaintiff's affidavits and determine whether they contain sufficient competent evidence to establish a prima facie case for any or all of the counts contained in the complaint. That is, if the facts necessary to establish any of the counts in the Commission's complaint are clearly set forth in its affidavits, then its motion for summary judgment will be granted. (C.T. 29-30.)

By formulating such a proposition, the Court has denied the plaintiff a trial on the merits and has violated accepted standards of procedural due process.

The true standard against which a motion for summary judgment must be gauged is significantly different from what the District Court has utilized. Under the correct rule, the burden of proof on a motion for summary judgment is much more strict than a trial on the merits. All inferences of fact from the proofs proferred at the hearing must be drawn against the moving party and in favor of the party opposing the motion. To determine whether the moving party has satisfied his burden, the papers supporting his position must be closely scrutinized while the opposing papers should be indulgently treated. *Kilfoyle v. Wright* (5th Cir. 1962) 300 F.2d 626. See also *Bozant v. Bank of New York* (2d Cir. 1946) 156 F.2d 789.

Not only must the moving party show the absence of any genuine issue of fact, he must also show that there is no real question about the credibility of his evidentiary material. Where there is the slightest doubt about the facts, the motion for summary judgment should be denied. *Hilton v. Triangle Publications, Inc.* (S.D.N.Y. 1961), 27 F.R.D. 468 (which granted a motion for summary judgment). See also *Colby v. Klune* (2d Cir. 1949) 178 F.2d 872 (which reversed a summary judgment because issues of credibility existed).

Applied to the present case, where the District Court acknowledged valid objections to the competency of the plaintiff's evidence and where the entire record shows opposition to some material allegations and ambiguous proof as to other material allegations, these principles obliged the District Court to grant the defendant her due—a trial on the merits.

Where there is the slightest doubt as to the facts, a litigant has the right to a trial (and a denial of that right is reviewable) because:

> . . . although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose

for which courts have been established. Denial of a trial on disputed facts is worse than delay.

Doehler Metal Furniture, Inc. v. United States (2d Cir. 1945) 149 F.2d 130, 135.

Having misconceived the basis for granting a summary judgment, the District Court committed such prejudicial error that its judgment must be reversed as incurable on appeal.

B. When a Court States It Will Disregard Incompetent Evidence in the Moving Party's Affidavits But Does Not Specify Which Evidence It Considers Incompetent and Which Competent, the Moving Party Should Not Be Entitled to Summary Judgment if There Is Any Doubt About the Competency of Its Material Proof

Despite the generally commendable effects of Rule 43 of the Federal Rules of Civil Procedure, liberalizing the rules of evidence in favor of admissibility, and despite the usual presumption that a court, sitting as a trier of fact, will disregard incompetent evidence, the defendant was prejudiced here by the District Court's failure to segregate competent evidence from incompetent matters in the plaintiff's documentary materials.

The District Court stated that it would "disregard" the incompetent parts of the plaintiff's affidavits, while giving "full effect" to the competent parts. (C.T. 29.) In so doing, the Court sought to comply with Rule 56(e) of the Federal Rules of Civil Procedure, which provides standards of admissibility for such documents, and with the settled rule that the court must disregard affidavits which contain only hearsay and legal conclusions. See *Engelhard Industries, Inc. v. Research Instrument Corp.* (9th Cir. 1963) 324 F.3d 347. Unfortunately for the defendant, however, the Court failed to specify which purported evidence fit into which category.

As indicated in *New York Life Insurance Co. v. Wilkinson Veneer Co.* (D.C.La. 1949) 86 F. Supp. 863, on which the Court relied, the same rules governing admissibility at trial will govern the admissibility of affidavit evidence. At a trial, of course, a party is expected to make timely objections to incompetent evidence or else he waives his right to exclude those matters. When he makes the objection, he is favored with a specific ruling as to the validity of his complaint. The trial attorney knows, to cite an example, whether a witness named Albert Sheppard could place in evidence, over objections, the statement that:

> ". . . According to my sister and brother-in-law, Mr. Moore represents Estelle Latta regarding this estate.
>
> "I paid $100 in cash to my sister for a contract called 'CONTRACT, In the Event of Recovery', a copy of which is attached as Exhibit A. As will be noted, it is dated December 27, 1963, and is apparently signed by Estelle Latta and witnessed by Mr. and Mrs. L. C. Moore. . . . I assume Mr. Moore handed it to her (*i.e.,* my sister) at the time she gave him the $100." (C.T. 18.)

The trial attorney knows, to continue this example, whether that objectionable statement could be used to support the Finding of Fact that:

> "Also, for many years, the defendant has been engaged in offering and selling to alleged heirs of Mark Hopkins and their descendants, as well as to other individuals, instruments entitled 'Contract in Event of Recovery', a specimen of which is set forth below:
>
> CONTRACT
>
> 'In Event of Recovery'
>
> 'For and in consideration of One Hundred Dollars ($100.00) to me in hand paid—the receipt for same is hereby acknowledged. I hereby assign and set over to
>
> (NAME) Mr. Albert Sheppard
>
> ... (Etc.) ..." (C.T. 38-39.)

The trial attorney knows, to conclude this example, whether Albert Sheppard's hearsay statements about the defendant would be stricken and entirely disregarded because of his testimony about the only direct contact he had with her:

> "*She did not try to sell any contracts at that time* and stated if anyone did not believe in what she was trying to do, that she did not want them involved in it." (C.T. 19. Emphasis added.)

The trial attorney, therefore, knows what this defendant can never know—whether the Court properly excluded from its consideration all incompetent matters. Not knowing this, the defendant can only trust that the same Court which refused to permit a trial on the merits was uniformly correct in determining what matters would influence its decision. Surely no litigant should be asked to surrender her rights so easily.

Emphasizing the importance of evidentiary issues like this, the United States Supreme Court has stated (in *Speiser v. Randall* (1958) 357 U.S. 513, 520, 2 L. ed 1460, 1469, 78 S.Ct. 1332):

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance as fully as great as the validity of the substantive rule of law to be applied."

To show that the plaintiff's evidence was unable, because of incompetency, to support the summary judgment, we need only examine the materials which the plaintiff introduced.

1. THE AFFIDAVITS

a. Jack Redden's affidavit (C.T. 21-22) declares in substance that as part of his work for the Securities and Exchange Commission he has seen a newspaper which contains a column purportedly written by the defendant, that he has seen advertisements for the sale of the defendant's book, and that he has seen a photograph of the defendant. Mr. Redden also has incorporated a copy of a newspaper column purportedly written by the defendant, though the purpose of this exhibit is not specified.

b. Albert Sheppard's affidavit (C.T. 18-19), as discussed above, contains only one competent statement about the defendant, namely, that on December 29, 1963, she gave a talk at the R.E.A. Building in Newman, Georgia, where her main topic was about a pending federal suit supposed to involve a Wells Fargo Bank trust fund in excess of three billion dollars, about Wall Street, and about the Securities and Exchange Commission.

All other aspects of Mr. Sheppard's affidavit (except for his eyewitness statement that the defendant did not try to sell any contracts at the time he heard her speak) deal with Mr. Sheppard's own identity, residence, and former occupation, as to which the defendant has no concern, or with incompetent matters formed exclusively of hearsay, opinions, and unsupported assumptions.

c. H. T. Nichols' affidavit (C.T. 1-3), except for statements about Mr. Nichols' own duties, position and activities, contains only incompetent hearsay. Nichols, an interested party to these proceedings since he is an employee of the Securities and Exchange Commission, has based his affidavit on interviews with "a number of witnesses" (C.T. 1), most of whom are not identified. He has shown no direct knowledge of any of the activities with which the defendant has been charged.

d. Cornelia Hopkins' affidavit (C.T. 4-6) is the most detailed statement on which the plaintiff has relied, yet a close analysis of that document reveals how inference, opinion, speculation and conclusions of law have been fatally intermixed in Mrs. Hopkins' remarks. The evidentiary weaknesses of this affidavit are examined, line by line, in Appendix A.

Taken as a whole, what Mrs. Hopkins has said amounts to nothing more than a collection of facts harmless to the defendant and inconsistent with jurisdiction in the Securities and Exchange Commission.

Examples:

". . . I obtained agreements from fourteen Georgia heirs . . ." (C.T. 4, par. 3, line 6) shows that Mrs. Hopkins, and not the defendant, carried out a particular transaction, and that the persons whom Mrs. Hopkins contacted were not part of the general public, but were instead members of a specific, unique family group—the descendants of Mark Hopkins.

"It was understood between Mrs. Latta and me . . ." (C.T. 5, par. 1, lines 2-3) is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundation to show the defendant's state of mind or knowledge.

". . . I began to have some suspicions about the deal . . ." (C.T. 5, par. 1, line 4) is Mrs. Hopkins' incompetent, gratuitous and unwarranted opinion, which tends to create prejudice and hostility against the defendant.

* * * * * * *

If the Court had disregarded the incompetent matters contained in these affidavits, it would not have been able to sustain the summary judgment. By stating that it has disregarded the incompetent matters, without making specific

rulings about the purported evidence, the Court has in no way cured the defects in the plaintiff's proof.

C. The Plaintiff's Own Evidence Contains Competent Testimony Which Can Sustain a Judgment for the Defendant and Which Puts Into Dispute All Material Facts of This Controversy

1. THE TESTIMONY OF L. C. MOORE

The sworn testimony of Mr. L. C. Moore is contained in the Official Report of Proceedings Before the Securities and Exchange Commission, dated February 6, 1963 and contained in the Record on Appeal as item number 43. (Page references refer to the pages of that Report.)

Mr. Moore's testimony contains competent matter which, if believed, would sustain a judgment for the defendant in this action.

Whether that testimony is believed or not, it is inconsistent with other testimony by Mr. Moore, so that the internal discrepancies alone bar a summary judgment.

Mr. Moore has sworn (Report, p. 12):

> "Q. Did you enter into any agreement with Mrs. Latta?
>
> "A. No.
>
> "Q. What are your duties *of* (or) functions in connection with the distribution of these contracts to which you refer?
>
> "A. Not anything at all."

Asked (Report, p. 10), "Who was selling these contracts, Mr. Moore?" he answered, "I don't know." Asked (Report, p. 22), "How long have these contracts—over what period have they been sold?" he answered, "I don't know." Asked (Report, p. 29) about telephone conversations he had with the defendant, he testified in this manner:

> "Q. Well, during these telephone conversations with her do you discuss the amount of money that has been raised?
>
> "A. No, sir."

Asked (Report, p. 34) how the defendant received certain money, Mr. Moore testified, "I don't know how she got that one, whether it was up at Durham or here or in California." Asked (Report, p. 38) how the defendant received carbon copies of certain contracts, he said, "I don't know. It might have been Durham. It might have been California."

Throughout his testimony, Mr. Moore did offer evidence about his own activities, but this conduct is irrelevant to the defendant's activities unless and until competent evidence clarifies Mr. Moore's relationship to the defendant. Nothing in the Report shows that the defendant should be held responsible for what Mr. Moore may have done.

2. THE DEPOSITION OF ESTELLE LATTA

The deposition of Estelle Latta, the defendant, contains facts which put into dispute virtually every contention made by the plaintiff on this motion for summary judgment. (This deposition is contained in the Record on Appeal as item number 42; page references refer to pages of that deposition.)

For those matters not directly disputed there are so many logical inferences favorable to the defendant from the 93-page transcript that no clear statement of facts is possible without a trial on the merits.

According to the Findings of Fact adopted by the District Court (C.T. 37), "The fortune left by Mark Hopkins who died about eighty-five years ago was distributed some eighty years ago in accordance with a decree of distribution entered in 1883."

But according to the defendant's deposition that finding is erroneous. Asked (Deposition, p. 89) about this subject, the defendant gave the following testimony:

"Q. What disposition was made of his estate?

"A. What disposition was made of his estate?

"Q. Yes.

"A. There was no disposition ever made of his estate, not legally."

With the Finding (C.T. 38) that the defendant has been offering and selling written instruments to alleged heirs of Mark Hopkins and their descendants, "as well as to other individuals," the Court has made a factual determination in conflict with the following testimony (Deposition, p. 62):

"Q. I thought you said you sold these to heirs and their intimate friends and family connections?

"A. I said the heirs had sold them to the intimate friends."

When the plaintiff's attorney stated (Deposition, p. 62), "As a matter of fact, you told Mr. L. C. Moore that he could sell these contracts to anybody, anybody who could—" the defendant responded, "No, I didn't tell Mr. L. C. Moore anything of the kind. I have kept this estate free, Mr. Latta."

To the question (Deposition, p. 66), "Have you accepted money from personal friends of yours?" she answered, "No." Elsewhere (Deposition, p. 29), she said, "I did not sell the contracts."

The defendant (Deposition, pp. 28-29) explained other matters in this fashion:

"Q. From the sale of the contracts, was that money used in the expenses of litigation?

"A. They have always given—I told you this is no contract. It is nothing more than just a receipt to get—that is no contract. That is no security."

To the inquiry (Deposition, pp. 21-22), "Let's put it this way, Mrs. Latta. What does a person who buys a contract such as this get for his $100?" the defendant answered in

a manner that contradicts the plaintiff's allegations and the Court's Findings:

> "I think I have answered that. This contract here entitled 'In the event of recovery' is nothing but a receipt because some of the heirs will pay for their part of the investigation.
>
> "Now, say, for instance, you looked at the number of the millions of acres of Federal Land Grants that I have put a direct claim of interest on. How much do you suppose it costs the law firm to draw up those? Well, who is going to pay for it? Somebody has to pay for it.
>
> "Well, if they pay for it, that means that they get this out of the estate before anybody else gets it, gets a part, if we get the contracts together and settle with the people. It is just as simple as all that, and it is the only way in the world—as the lawyer says, I didn't make the contracts. The contracts were made years ago because the heirs were so poor—the estate was stolen from them. They had to even sell the contracts to prove the heirship, and the heirship is proven everywhere, and I have never known an intervention before in my life in the prosecuting of a private estate before."

With such testimony in the record, the Court could not properly declare that no genuine issues existed as to material facts in this controversy. The conflicts are too fundamental to be disposed of in summary fashion.

D. Earlier Litigation Against the Mark Hopkins Estate Is Not Necessarily Material to the Issues in the Present Case

Nowhere has it been competently proven that the defendant concealed earlier litigation which would bar a distribution of the Mark Hopkins estate, although the plaintiff so alleged (C.T. 10, 36), the Court so found (C.T. 41-42), and the Court so concluded (C.T. 43).

Nowhere does the plaintiff or the court take into account the principle that an honest belief in the truth of a matter condones misstatements—(see *Stone v. United States* (6th Cir. 1940) 113 F.2d 70)—although the defendant's belief in what she has been saying permeates every part of her testimony.

Through a misplaced reliance on *Latta v. Western Investment Co.* (9th Cir. 1949) 173 F.2d 99, the District Court has found that the Ninth Circuit Court of Appeals had "definitively disposed of the claims of contract holders as well as other alleged heirs of Mark Hopkins." (C.T. 41.)

By so ruling, the District Court has committed error since the state courts of California, and not the federal courts, alone have the power to "definitively" dispose of the claims of the heirs to an estate. Probate matters, as such, are beyond federal jurisdiction.

What the Ninth Circuit Court of Appeals has said about the Mark Hopkins Estate in *Latta v. Western Investment Co., supra,* is obiter dicta, not required by the issues before the court. For this reason it is a question of specific fact as to whether or not that case constitutes significant litigation which the defendant has a duty to disclose regardless of circumstances.

As to *Freeman v. Hopkins* (9th Cir. 1929) 32 F.2d 756 (see C.T. 41-42), the same lack of ultimate jurisdiction in a federal court makes the issues of materiality and deliberate deceptiveness a question of fact in the specific circumstances of each alleged nondisclosure. In *Freeman, supra,* it should be noted, the heirs claimed *no* interest in the real property of which Mark Hopkins had been possessed at the time of his death. That fact alone distinguishes the *Freeman, supra,* litigation from the defendant's alleged activities in this case, and reinforces doubts about the materiality of the earlier litigation.

Neither materiality nor concealment nor fraudulent intent has been shown in the plaintiff's purported evidence to support its motion for summary judgment.

E. Neither the Attempt by Heirs to an Estate to Recover Their Inheritance Nor Their Sharing of Expenses, Including Legal Expenses, Places Their Activities Within the Jurisdiction of the Securities and Exchange Commission

According to the District Court's Findings (C.T. 40), the "Contracts In Event of Recovery" are "investment contracts" and "certificates of interest and participation," and are therefore "securities" under the jurisdiction of the Securities and Exchange Commission. This case presents a situation, so that Court has found (C.T. 40), in which the economic welfare of "investors" is "inextricably woven" with the ability of the promoter, *i.e.,* the defendant, to carry out a common enterprise for the benefit of those whose "investments" are "solicited."

But under the test laid down in *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.* (9th Cir. 1960) 285 F.2d 162, a case where the defendants had admitted selling to the public, the real question was said to be:

Is the investor led to expect profits *solely* from the efforts of one or more defendants arising from a common enterprise? (Emphasis added.)

In the present case, the defendant's role, according to her deposition, is to assist herself and other heirs to reach a position where their own efforts, *i.e.,* their family ties to Mark Hopkins, will enable them to claim their inheritance. The kinship will determine the benefits they receive—and the defendant cannot create or damage those family relationships.

This is not a case where a group of strangers, a random section of the public, abdicates its control over funds in

the hopes that someone else will acquire a profit for them but, rather, is a case of a family seeking to regain what it believes is its own. Under such facts, if they are facts, the plaintiff lacks power to interfere with the heirs' family activities; under such evidence, if the facts are yet to be established, the Court lacks power to grant summary judgment.

To support its conclusion that the interests allegedly sold in this matter are "securities" within the jurisdiction of the Securities and Exchange Commission, the plaintiff is likely to rely on an unreported oral memorandum by a United States District Court Judge. See *S.E.C. v. McBride* (D.C.M.D. Tenn. 1956); see also Record on Appeal item number 21, Memorandum of Securities and Exchange Commission in Support of Motion for Summary Judgment, etc., filed July 6, 1964, p. 13.

In *McBride, supra,* after a full hearing on the merits where many witnesses testified, where documentary evidence was introduced, and (apparently) where the Commission's presentation was subjected to cross-examination and rebuttal evidence, the Court held that the disputed instruments were "securities."

We cannot, however, assume that because certain interests in a lawsuit over oil, gas and mineral rights have once been deemed securities, that all interests in litigation are securities, provided the parties are sufficiently numerous.

The orderly administration of civil justice would be disrupted if the Securities and Exchange Commission could claim jurisdiction over family cooperative efforts to preserve legal rights, on the ground that the family is investing in its own welfare without having conformed with Commission requirements. No such powers can be engrafted

into the Securities Act of 1933, as amended, and no such powers to regulate private litigation can constitutionally be given to an administrative body. Due process is offended when the Securities and Exchange Commission assumes for itself the judicial function of determining which litigation may properly be carried on by which interested parties.

VIII.

CONCLUSION

The District Court's granting of the plaintiff's motion for summary judgment was erroneous because:

1. Genuine issues of material fact are in controversy and have not been eliminated by the plaintiff's purported evidence.

2. The Securities and Exchange Commission lacks jurisdiction over the sharing of expenses, including legal expenses, in a family cooperative effort to preserve legal rights, such as exist here.

The summary judgment against the defendant should therefore be reversed.

Dated: August 30, 1965.

Respectfully submitted,

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Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

George T. Davis

(Appendix Follows)

Appendix A

The affidavit of Mrs. Cornelia Hopkins, on which the plaintiff so much relies to establish its facts, contains inference, opinion, speculation and conclusions of law fatally intermixed with what may be competent statements. In this Appendix, the Hopkins affidavit will be analyzed in detail to show why it cannot properly support a summary judgment against the defendant. (Page references are to the Clerk's Transcript.)

a. C.T., p. 4, paragraph 1, lines 8-10:

(1) "To my knowledge" gives no foundation showing how, if at all, Mrs. Hopkins obtained that knowledge. As offered, the statement is nothing more than an improper attempt to avoid objections that Mrs. Hopkins' remarks are incompetent. On this ground alone, the court should reject the affidavit.

(2) "In order to raise funds for this purpose" is Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, since it refers to matters outside Mrs. Hopkins' knowledge.

(3) "Made a public offering" is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundations, on a subject that is a matter of law, namely, what is "public" and what is an "offering"?

b. C.T., p. 4, paragraph 3, lines 4-8:

(1) "Negotiations" is a meaningless word which gives no indication of what, if anything, was said between the parties and, if something had been said, the purpose to which the statements had been directed. Specifically, no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship can be inferred from the word "negotiations", nor can any of Mrs. Hopkins' later

actions be said to have been connected with these negotiations or with the defendant.

(2) "Approval" does not indicate the things which the defendant allegedly approved, nor does it show that the defendant's approval was a necessary or even a desired condition for Mrs. Hopkins' later actions.

(3) "I telephoned . . . I obtained" shows that whatever transactions did occur were performed solely by Mrs. Hopkins and not by the defendant.

(4) "Agreements from fourteen Georgia heirs" shows that the persons whom Mrs. Hopkins contacted were not part of the general public, but were members of a specific, unique, family group—the descendants of Mark Hopkins.

(5) "One contract (was) purchased by my husband" shows that Mr. Hopkins bought a contract. Nothing in this statement indicates that the defendant knew he had recently crossed a state line, that the defendant had induced him to cross the state line, that the defendant had offered to sell anything to him, or that the defendant, in any way, directly or indirectly, influenced him to make the purchase. These gaps in information also apply to the statement in Mrs. Hopkins' affidavit (Paragraph 3, lines 8-10) that Mrs. Della Hopkins Noland purchased one contract.

c. C.T., p. 4, paragraph 4, lines 1-3:

(1) "For the purpose of delivering these" is Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, except for any purpose known to Mrs. Hopkins and not known to the defendant. It was Mrs. Hopkins and not the defendant who carried the contracts. Since no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship has ever been shown between Mrs. Hopkins and the defendant, no purpose of Mrs. Hopkins can be attributed to the defendant.

(2) "Securities . . . (and) . . . investors" represents Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, on subjects that are matters of law, namely, what are "securities" and what are "investors"?

d. C.T., p. 5, paragraph 5, lines 1-3:

"By arrangement with Mrs. Latta" is a meaningless phrase which gives no indication of what, if anything, was arranged between the parties. Specifically, no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship can be inferred from this phrase, nor can any of Mrs. Hopkins' later actions be said to have been connected with this "arrangement" or with the defendant.

e. C.T., p. 5, paragraph 1, line 1:

"At the instruction of Mrs. Latta" gives no details about the meaning and purpose of the language supposed to have been an instruction, nor does it show whether the remarks were actually suggestions which Mrs. Hopkins could freely ignore as the gratuitous expression of one acquaintance talking to another.

f. C.T., p. 5, paragraph 1, lines 2-3:

"It was understood between Mrs. Latta and me" is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundation, to show the defendant's state of mind and knowledge.

g. C.T., p. 5, paragraph 1, lines 4-6:

(1) "I began to have some suspicions about the deal" is Mrs. Hopkins' incompetent, gratuitous and unwarranted opinion, included in this affidavit as a means, surely, of creating prejudice and hostility against the defendant.

(2) "And never sent any copies to her, but retained the pink copies" negates any employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship

inferred between the defendant and Mrs. Hopkins and therefore bars the inference that the defendant directly or indirectly committed acts within the Commission's jurisdiction.

h. C.T., p. 5, paragraph 2, lines 1-10:

(1) "My first visit to Durham", "I paid", "I took back", "I sent", "Then I sent", "I went to Durham a second time and gave", and "I turned over" all show that it was Mrs. Hopkins, and not the defendant, who engaged in acts which might give rise to jurisdiction in the Commission. Since no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship has been established between the defendant and Mrs. Hopkins, Mrs. Hopkins' activities give no basis for jurisdiction over the defendant.

(2) "All of my checks . . . were on our personal checking account" shows that Mrs. Hopkins and her husband exercised dominion and ownership prerogatives over the money they received, thus negating control by the defendant.

i. C.T., p. 5, paragraph 3, lines 1-6:

(1) "I called two mass meetings" shows action, not by the defendant, but by Mrs. Hopkins.

(2) "Primarily for the purpose of making progress reports to the investors" shows Mrs. Hopkins' purpose, but not the defendant's, and also improperly uses a legal conclusion—"investors"—to describe the audience.

(3) "I would explain to them the necessity for obtaining funds to fight the lawsuit" shows Mrs. Hopkins' activities, but not the defendant's. Provided Mrs. Hopkins has not under local law been guilty of champerty or maintenance, her right to assist in litigation is not a forbidden act and is not, as presented, within the Commission's jurisdiction.

(4) "[I] would state that if anyone wanted to invest any money in the venture, I would take it" shows what Mrs. Hopkins said and was willing to do, but does not show any action or intent by the defendant.

j. C.T., p. 5, paragraph 4, lines 1-2:

(1) "I never received any commissions or other remuneration" negates any employer-employee, partnership, principal-agent or similar relationship between Mrs. Hopkins and the defendant.

(2) "I was repaid incidental expenses" does not show who repaid the expenses, why they were repaid, or whether any duty to repay them existed.

k. C.T., p. 5, paragraph 4, lines 3-5:

(1) "Mrs. Latta made a number of telephone calls from Durham to my home when she would discuss the estate" shows that conversations were conducted about a matter of inheritance between prospective heirs and not, as presented, about a subject within the Commission's jurisdiction.

(2) "[She would] press for more money" is an argumentative and incompetent conclusion which gives Mrs. Hopkins' opinions of her conversations with the defendant, rather than the details of what, if anything, was said. "Press" is too ambiguous a word to represent a simple fact.

(3) "And urge further efforts to dispose of the contracts" is also an argumentative, incompetent conclusion which does not describe the meaning of "urge", "further efforts", or "dispose of" and therefore cannot establish any relationship between Mrs. Hopkins and the defendant or show the nature of any activity the defendant has allegedly performed. Without details, Mrs. Hopkins' generalizations are valueless.

l. C.T., pp. 5-6, paragraph 5, lines 1-6:

"Eventually . . . I disassociated myself from the deal entirely" negates a vendor-purchaser or similar relationship between the defendant and Mrs. Hopkins, and refers only to actions by Mrs. Hopkins which are irrelevant to any thing the defendant has done. The conclusions of Mrs. Hopkins are not only irrelevant but incompetent as well.